Experts’ interpretations of treaties

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Danae Azaria’s article makes a very valuable contribution to the understanding of interpretation in international law and of the significant role of the ILC. It prompts further thoughts regarding experts’ role in treaty interpretation.

First, what is interpretation? ‘Interpretation’ is something that lawyers do all the time. The article shows well that defining more precisely what this activity is, classifying it into categories, and identifying whose interpretation has what value is all more difficult. The article posits that “interpretation in international law is commonly understood as ‘the process of determining the meaning of’ a text or a rule”, and that “the practice of law operates on the assumption that there is one correct interpretation and that this meaning has to be found” (*Azaria* at p. 175–6) The four examples in the article relate to the 1969 Vienna Convention on the Law of Treaties (VCLT). The focus here is therefore on treaty interpretation, rather than on rules of customary international law generally.

Interpreting by giving a meaning

In its further explanation of interpretation of treaties, the 1935 Harvard research indicated that: “In most instances … interpretation involves *giving* a meaning to a text” (original emphasis) which, it noted, “is obviously a task which calls for investigation, weighing of evidence, judgment, foresight, and a nice appreciation of a number of factors varying from case to case.” (at p. 946). As the lead architect of the VCLT, Professor Humphrey Waldock specifically endorsed this notion that interpretation requires ‘giving’ meaning to a text, emphasising that “the process of interpretation, rightly conceived, cannot be regarded as a mere mechanical one of drawing inevitable meanings from the words in a text, or of searching for and discovering some pre-existing specific intention of the parties” (at p. 53).

The importance of this difference of emphasis between ‘giving’ a properly reasoned interpretation and the practitioner’s quest of ‘finding’ the ‘correct’ interpretation may be crucial in the present context. It necessarily leads one to ask: Who is the giver of the meaning? The quotation from *Jaworzina* (at p. 5) that “the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it”, as cited by Azaria (at p. 189–90) may still represent the ultimate truth. That case, however, was decided at a time before multiple courts and tribunals were authorised to interpret international law and treaties. Much treaty interpretation is in the hands of domestic courts and tribunals, as well as ministries and other governmental bodies whose detailed work may be very largely out of the public eye. These institutions frequently find it helpful to use published views of experts, sometimes treating them as if they were authoritative.

Identifying the phases of treaty interpretation

Is there a ‘correct’ interpretation, which can be given only by agreement of the parties? This seems unrealistic for practical purposes. The Vienna rules, for the most part, only indicate *what* is to be taken into account, with scant and somewhat elliptical suggestions of *how* the elements are to be evaluated. Thus, the best (rather than ‘correct’) interpretation is one that takes proper account of the indicated VCLT elements by an interpreter who has the necessary skills in weighing evidence with judgement, foresight, and the nice appreciation of relevant factors instanced by the Harvard commentary and Professor Waldock.

Thus, there are in effect two phases in interpreting a treaty: first, the collection and martialling of the interpretative elements present in the particular case and, second, the application of skill and judgement in evaluating these elements and melding them into a coherent and well-reasoned conclusion. The onlooker can evaluate the first stage with greater confidence than the second. For example, some arbitral awards (notoriously some concerning bilateral investment treaties), while professing to apply the Vienna rules manifestly fail to marshal all the relevant elements. Failure at the first stage vitiates attempts to achieve the second stage. Thus, for a court or tribunal seeking guidance on interpretation of a particular point which has already been tackled elsewhere, evaluation of ‘precedents’ can be problematic. Hence they come to place reliance on ‘experts’.

Placing reliance on ‘experts’

Here are two examples of experts who have no specific authority to give binding interpretations but some of whose interpretations have been treated by courts and tribunals as highly authoritative. One such is Professor Elisa Pérez-Vera’s *Explanatory Report on the 1980 Hague Child Abduction Convention*. This was drawn up after the Convention’s conclusion. Professor Pérez-Vera, who had been Rapporteur at the conference adopting the treaty, frankly acknowledges that “it is possible that, despite the [Rapporteur’s] efforts to remain objective, certain passages reflect a viewpoint which is in part subjective”. The Report’s interpretations have nevertheless been treated in courts around the world as highly authoritative in proceedings concerning child abduction (for cases, see Gardiner, *Treaty Interpretation*, at p. 403, fn. 207).

Another example, whose status has been rather more variously described by courts, is the UN High Commissioner for Refugees’ (UNHCR) *Handbook on Procedures and Criteria for Determining Refugee Status*. This Handbook (with supplementing guidelines), which takes account of practice of states and their communications with the UNHCR, has been used in interpretation of the 1951 UN Convention on Refugees in courts in the United Kingdom and elsewhere (for cases, see Gardiner, *Treaty Interpretation*, at p. 402, fn. 199). The Handbook may be seen mainly as a guide to practice but it also offers interpretations that states may choose to follow. The ILC’s *Guide to Practice on Reservations to Treaties*is of similar character. As Azaria clearly demonstrates in her article (at p. 179), the Guide is revealing interpretations as well as suggesting progressive development.

If the work of expert treaty bodies comes to be regarded as providing interpretations of authoritative standing, that may be because of their status under the relevant

treaty or as a result of acknowledgement of their status by organs of the institution associated with the treaty. The ILC can be seen to be a body having a remit derived from the UN Charter and by virtue of its work under the aegis of the UN General Assembly. It is a group of highly qualified experts having general competence in the field of international law. Thus, the ILC Guide on Reservations has at least equivalent (if not greater) potential to be drawn on for such authoritative acknowledgment by courts and tribunals as the Pérez-Vera Report or the High Commissioner's Handbook, even though not in itself a source of binding interpretations. The ILC's 'conclusions' and commentaries on other topics, whatever descriptive titles they bear, can operate in a similar way.

Experts' interpretation as legitimste and desirable interpretation

While, therefore, a proper interpretation may be different from one which is binding or definitive, use of guiding interpretations by recognised treaty experts who have the skills and opportunities to deploy the elements of interpretation properly should be recognised as legitimate and desirable. Hence, the examples above reinforce the consideration of expert treaty bodies in Professor Azaria's article and show good support for the idea of codification by interpretation in the work of the ILC.
